IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

WRIT PETITION NO.1221 OF 2007

Tushar Rajendra Jadhav & ors. : Petitioners.

versus

Pralhad Ramrao Jadhav & ors. : Respondents.

Ms.Priya Ranade with Mr.Vivek Phadke i/by M/s.Kaikani Phadke & Associates for the petitioners.

Mr.Madhav Jamdar for Respondent No.1.

CORAM : D.B.BHOSALE, J.

DATED : JULY 12, 2007.

P.C.

1. I have heard the learned counsel for the parties. Rule. By consent the Rule is made returnable forthwith.

2. This petition is directed against an order dated 28.4.2006 passed by the trial Court on the application at Exhibit 40 in Regular Civil

Suit No.471 of 2005 dismissing the said application of the petitioners-plaintiffs seeking an amendment of the plaint. It was filed under Order VI Rule 17 of the Code of Civil Procedure seeking permission to add Respondent Nos.2 and 3 as defendants in the suit. The trial Court has rejected the said application for the reasons stated in paras 7 and 8 of the impugned order.

3. Respondent Nos. 2 and 3 are the brother and son of Respondent - defendant No.1. Respondent No.1 claims that he is the owner of the suit property in respect of which the petitioners are seeking injunction against him.

4. Mr.Jamdar, learned counsel appearing for the respondents, opposed the prayer on the ground of latches and delay. He submitted that this petition itself has been filed after ten months of passing the impugned order. The written statement was filed by Respondent No.1/defendant on 23.3.2006. The issues were framed on 29.6.2006 and even the affidavit in lieu of examination-in-chief has been filed by the petitioners on 19.6.2006. He then submitted that the provisions of Order VI Rule 17 of the Code of

Civil Procedure are mandatory in nature and in the present case it cannot be said that the amendment sought could not have been brought at an earlier stage of the proceedings or before filing of the affidavit in lieu of examination in chief. He further submits that the trial court has rightly rejected the application and this Court need not interfere with such order in its extremely limited jurisdiction under Articles 227 of the Constitution of India.

5. Looking to the interse relationship of the respondents and the defence set up by Respondent No.1/defendant, who claims to be the owner of the suit property, I am of the view that Respondent Nos.2 and 3 are proper and necessary parties to the instant proceeding. Even if an injunction is granted against Respondent No.1, there is every possibility that Respondent Nos. 2 and 3 may disturb the possession of the petitioners. The petitioner No.3, who is widow with her two minor children, is fighting this litigation to protect her possession over the suit property.

6. It is now well settled that Proviso to

Order 6, Rule 17 is procedural and not a part of substantive law. It does not deal with power of the Court and also does not specifically take away the power of the Court to allow the amendment after the commencement of trial. It only empowers the Court to reject the application if it comes to the conclusion that in spite of "due diligence", the parties could not have sought the amendment before the commencement of trial. The proviso to Rule 17 of Order 6 of the Civil Procedure Code, in the present form and context, is directory and not mandatory. While dealing with the application under Order 6, Rule 17 Courts can apply the principles/guidelines laid down by the Supreme Court and High Courts before the Amendment of 2002 came into force, if the amendment is found to be necessary and if it is permissible for the plaintiff to file an independent suit for the same relief, which could be prayed for in a new suit, it should be permitted to be incorporated in the pending suit by way of an amendment. Such amendment would curtail multiplicity of legal proceedings. **(See Bharat Petroleum Corporation Ltd. v/s. Precious Finance Investments Pvt. Ltd.** reported in **2007(1) Mh.L.J. 331).** In the circumstances this

petitions deserves to be allowed. Hence I pass the following order :-

:ORDER:

The Writ Petition is allowed.

Rule is made absolute in terms of prayer clause (a) of the Petition.

The petitioners are allowed to carry out the amendment of the plaint within a period of two weeks from the date of receipt of this order.

The trial Court to proceed with hearing of the suit and dispose it of expeditiously.

It is needless to express that the respondents, if so advised, will be at liberty to file their written statement/additional written statement after the amendment is carried out.

Rule is made absolute in aforesaid terms.

Writ Petition is disposed of.

[D.B.BHOSALE, J]